

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original Affidavit of Mailing

77-1407

To be argued by
ZACHARY W. CARTER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1407

UNITED STATES OF AMERICA,

Appellee

—against—

RONALD BELL,

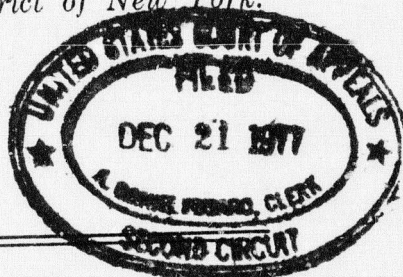
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.

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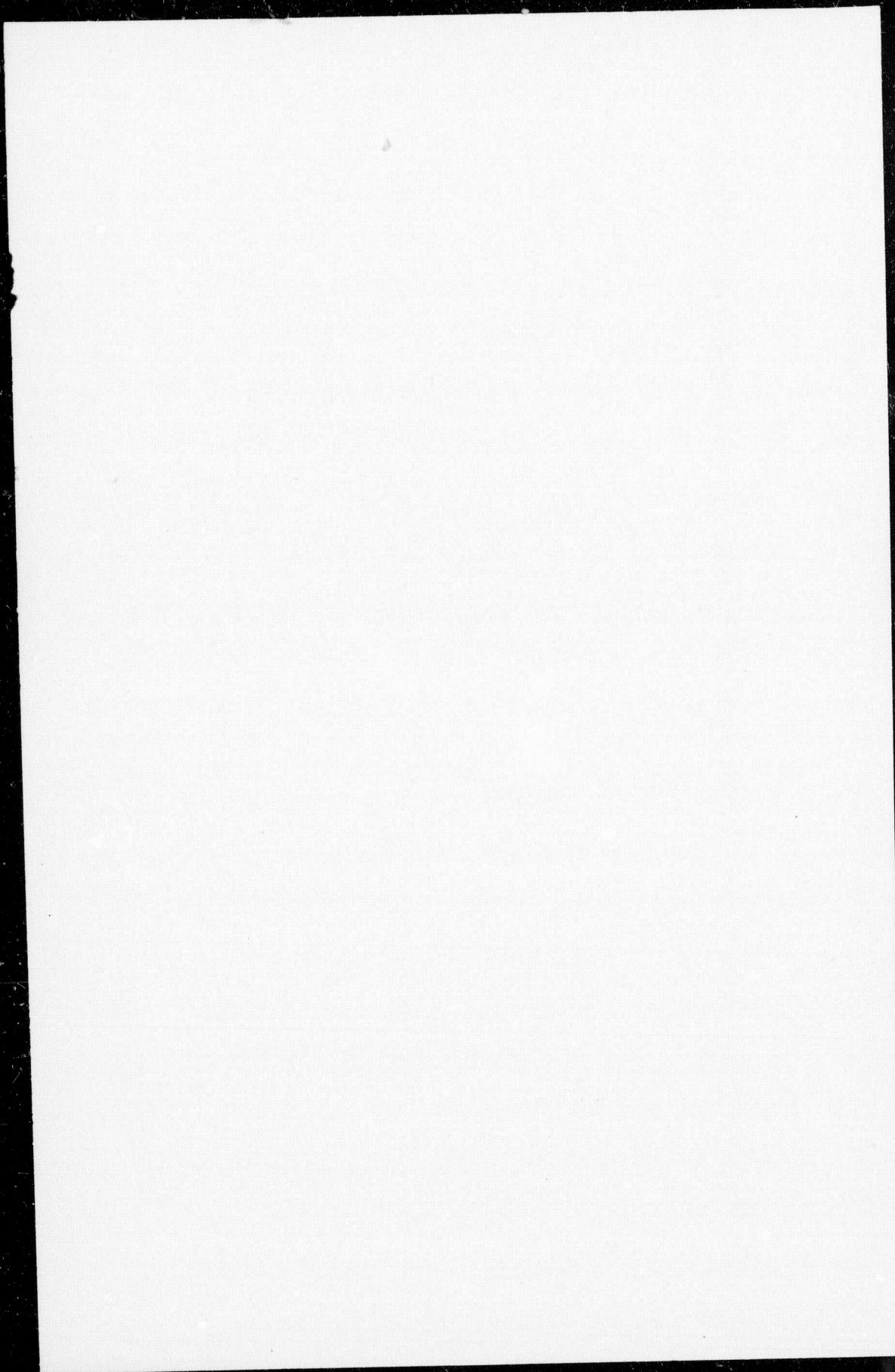


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UNITED STATES OF AMERICA,

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—against—

RONALD BELL,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

Preliminary Statement

Ronald Bell appeals from a judgment entered on September 16, 1977 in the United States District Court for the Eastern District of New York (Jacob Mishler, *Ch. J.*) convicting him, after a jury trial, of armed bank robbery, in violation of Title 18, United States Code, Sections 2113(d) and 2, and conspiracy to commit bank robberies, in violation of Title 18, United States Code, Section 371. Appellant was named in a five count indictment. Count One charged appellant, together with Charles Williams, Robert McGray, Curtis King, Gary Graham and Robert Hairston, with conspiracy to rob a series of banks, within the Eastern District of New York and elsewhere, between January 1, 1976 and May 31,

1976. In Counts Two and Three, appellant was charged, together with Charles Williams, Robert McGray, Curtis King and Gary Graham, with the armed robbery of a European American Bank located in Westbury, Long Island, on February 9, 1976.¹

Appellant was sentenced to imprisonment for a period of five years on the conspiracy count and fifteen years on the armed bank robbery charge, said terms to run concurrently with each other, consecutively to a New York State sentence of one and one-half to three years which appellant was currently serving for grand larceny and concurrently with any parole violation time owed with respect to a previous bank robbery conviction.²

On appeal, appellant makes two claims: *first*, that the trial court erred in admitting in evidence his post indictment statement to an F.B.I. agent, and *second*, that the court improperly instructed the jury that it could consider his prior bank "larceny"³ conviction as similar act evidence.

¹ The remaining Counts, Four and Five, charged Charles Williams, Robert McGray and Curtis King with the March 11, 1976 robbery of a Nassau Savings and Loan Association branch located in Rockville Centre, New York.

² Charles Williams and Robert McGray were tried together before United States District Judge Henry Bramwell between June 28th and July 12, 1977. Both Williams and McGray were convicted on all counts of the indictment and are currently serving sentences of imprisonment. Robert Hairston pleaded guilty to the conspiracy count, the only one in which he was charged, and is also serving a prison term. Gary Graham, who was tried together with appellant before Chief Judge Mishler, was convicted of the conspiracy count only and received five years probation. Graham does not appeal his conviction. King pleaded guilty to one count of bank robbery. He is awaiting sentence.

³ Appellant later acknowledged that the crime for which he was convicted was bank robbery and not bank larceny. The reduction of appellant's sentence from fifteen years to ten years (the maximum term of imprisonment for bank larceny, T. 18 U.S.C. § 2113(b) created the initial confusion on this point.

Statement of Facts

A. The Government's Case

The Government's proof at trial established that during the early part of 1976 one Charles Williams, also known as "Chaz" and his associate, Robert McGray, also known as "Sabu", assembled a group of individuals, including appellant, appellant's brother-in-law, Gary Graham, and an individual named Curtis King, for the purpose of robbing banks in the New York area and elsewhere. Williams and McGray, who had apparently refined the act of bank robbery to somewhat of an art form, shared their expertise with their recruited accomplices, and eventually undertook the robbery of the European American Bank in Westbury, New York on February 9, 1976 (Counts Two and Three), the Kilbourne State Bank in Milwaukee, Wisconsin on March 11, 1976 (Overt Act two of Count One), and another Long Island Bank in May of 1976 (Counts Four and Five). Appellant and Gary Graham participated directly in the February 9th robbery only; but, they shared in the proceeds of the Wisconsin robbery, apparently in consideration for their continued availability.

The sources of the Government's proof fell into four main categories: (1) the testimony of Curtis King who participated in each of the aforementioned robberies; (2) the testimony of a woman named Norvette McKenney, who accompanied appellant, Graham, King, Williams and McGray on their junket to Westbury on February 9, 1977, but who remained ignorant of the objective of their trip; (3) the testimony of employees of the European American Bank and an employee of a nearby apartment complex, all of whom corroborated King's testimony regarding the February 9th robbery in significant detail; and (4) the signed statements of appellant and Graham, in which each admitted his own participation in the

February 9th robbery and also implicated Williams, McGray and King, as well as each other.

From the collective contribution of the witnesses and evidence, the following facts emerged:

At some point in the beginning of 1976, appellant invited Curtis King to his home to meet Charles Williams and Robert McGray (T. 55).⁴ King and appellant had become acquainted in 1975 through Gary Graham, whom King had known for several years and who was appellant's brother-in-law (T. 55-56).⁵ That first meeting, at which King was introduced to Williams and McGray, developed into a quasi job interview in which Williams questioned King about his past experience in various criminal enterprises. Williams was particularly interested in whether King had any bank robbery experience (T.57-58). King explained to Williams, as he later testified at trial, that he had been involved in armed robberies before, but never in bank robberies. King left the meeting after giving Williams his telephone number (T. 58).

A week or two after their first meeting, Williams telephoned King. On that same day, Williams and McGray met with King at King's apartment in Brooklyn (T. 59, 62-63). There Williams and McGray outlined their formula for bank robbery. Each member of the bank robbery team was assigned a specific task. One robber would act as a floorman. The floorman, who would

⁴ References to pages of the trial transcript are preceded by the letter "T". References to pages of the transcript of the suppression hearing are preceded by the letter "H".

⁵ Appellant, both in his interview with Special Agent Ronald Mahaffey and in his testimony at trial, stated that he had met Williams in 1972 while they were both inmates at the Lewisburg Federal Penitentiary where appellant was serving time for bank robbery.

be armed with a shotgun, would "secure" the bank by commanding all persons inside to get on the floor. It was also the floorman's job to time the robbery with a stopwatch and instruct the other robbers when it was time to leave. No robbery was to take longer than one minute. The remaining robbers were designated as "countermen". Their job was to vault the teller's counter and retrieve money from the cash drawers (T. 63-64). Williams and McGray then proceeded to instruct King in precisely how he would function as a counterman. Stacks of paper were placed at various intervals around King's apartment, and King was clocked as he scurried about retrieving the simulated cash bundles (T. 65).

King testified that a few days prior to the Westbury robbery, Williams, McGray, Graham and appellant assembled at King's apartment and began the bank robbery preparation in earnest (T. 68-69). It was determined that Williams, King, and appellant would act as counter men. McGray would be floorman. Appellant nominated his brother-in-law, Graham to be the driver and the others agreed (T. 72). King was assigned to assemble all of the "gear" they would need to rob the bank, including ski masks, sweatshirts, bags, and guns (T. 73).

King testified that on the day preceding the robbery, he (King), Williams, McGray and another individual drove in a station wagon to New Jersey in order to steal a car to be used in the bank robbery. After they located a Plymouth with its motor running, King took the car and drove it to a location in Queens where it was "stashed" (T. 67).⁶ King then returned to his residence.

King testified that on the morning of the robbery, Gary Graham picked him up at his residence in Graham's

⁶ The Government stipulated that the New Jersey Plymouth identified as the getaway car in the first robbery was in fact stolen on the morning of the February 9th robbery.

Toyota. Together they drove to the area where the stolen car had been hidden and waited for the others to arrive. Appellant showed up at that location driving his red Lincoln Continental and accompanied by a young woman whose name King could not recall (T. 76). Subsequently, Williams and McGray arrived at the rendezvous in a stationwagon (T. 77). After they were all assembled, Williams led the group along a highway into Long Island. Williams and McGray remained in the stationwagon, appellant and the young woman traveled in the red Lincoln, Graham drove his Toyota, and King followed in the stolen Plymouth (T. 78-79).

After travelling along the highway for some distance, the group proceeded to an apartment complex located approximately one hundred yards from the European American Bank in Westbury (T. 81). George Stevens, who was employed at the Westwood Village apartment complex located next to the European American Bank, testified that on the morning of February 9, 1977, he observed four cars including a brown stationwagon, a green Plymouth and a red Lincoln Continental drive into the complex. Stevens stated that he thought the occurrence unusual because all of the occupants of the car were black and since the complex was predominantly white. Stevens noted further that the occupants of the red Lincoln were a black male and female (T. 185-187).

At the complex, Williams, McGray, King and appellant donned their "gear" and joined Graham in the stolen car (T. 80). Graham then drove them the short distance to the European American Bank. When they arrived, Williams, McGray, King and appellant, now masked and armed, entered the bank (T. 81..). According to plan, McGray, wielding a shotgun, entered first and directed everyone inside to get down on the floor. Williams, King and appellant followed McGray into the bank, vaulted the

counter and began looking for and taking money.⁷ Meanwhile, McGray kept track of time on a stopwatch he had brought into the bank.⁸ On McGray's command, everyone left the bank. The four robbers then joined Graham in the stolen car and sped off toward the apartment complex.⁹

When Williams, McGray, King, Graham and appellant arrived back at the apartment complex, they deposited their gear and the money in the trunk of appellant's Lincoln. King joined Graham in his Toyota, Williams and McGray returned to their stationwagon, and appellant got back into his Lincoln. They then left the area, the stolen Plymouth being abandoned in the parking lot. The five robbers then headed toward Brooklyn where they eventually re-assembled at King's apartment and divided the proceeds of the robbery. Afterwards, all the participants went their separate ways (T. 91).

Several weeks later, King received a long distance call from McGray and Williams, during which they invited King to join them in an out of town job. King advised them that he was indeed interested in "working" again. Williams instructed him to contact appellant and inform

⁷ King, who was a rookie in the bank robbery business, failed to locate money in any of the drawers he searched and ultimately left the bank empty handed (Tr. 83). Renee McCann, a teller at the bank, later testified at trial that one of the robbers who vaulted the counter looked in various drawers but couldn't find any money (T. 215).

⁸ A series of photographs taken during the robbery by a surveillance camera depicted a masked figure holding a shotgun in one hand and a stopwatch he appeared to be studying in the other (Exhibit 2).

⁹ Lana Bischoff, an employee of the bank ran to the door in time to see the car leave. Later that same day, she identified the Plymouth with New Jersey registration at the nearby Westwood Village apartment complex where it had been abandoned (T. 201). George Stevens testified that he too viewed the Plymouth after the robbery when the police came to the apartment complex to see it. It was the same car he had seen earlier that morning (T. 188).

him about their intentions. King did what he was told. Appellant told King that he would not join in the out of town job at that time but that he would be available if he were needed (T. 96). It was agreed that appellant and Graham would share in the proceeds of the robbery (T. 101). Appellant told King to keep in touch. On a subsequent day, appellant picked up King and drove him, together with a woman named "Theresa," to John F. Kennedy International Airport. King and Theresa then flew to Chicago where they met Williams, McGray and an individual named Robert Hairston. After a few days of looking for a target bank, Williams, McGray, Hairston and King settled on, and robbed, the Kilbourne State Bank in Milwaukee, Wisconsin (T. 98-99). When King returned to New York, he split his share of the bank robbery money with appellant and Graham (T. 102).

Also testifying for the Government was Norvette McKenny. Although McKenny was under a prison sentence for a narcotics offense when she testified, at the time of the trial she was, ironically, employed as a teller trainee at a local bank in conjunction with a work release program (T. 374).¹⁰ McKenny stated that she dated appellant for two months during 1975. On a day in early 1976, appellant telephoned her and stated that he would pick her up the following morning at 8:30 a.m. On the following morning, appellant picked up McKenny in his red Lincoln Continental and drove her to a location in Queens. When they arrived, appellant left his car and had a conversation with Gary Graham, Curtis King, and some persons whom she did not know. (T. 377, 381). After a short meeting, appellant returned to the car and drove McKenny to an apartment complex in Long Island

¹⁰ During her direct testimony, Judge Mishler interrupted the proceedings, excused the jury, and declared her a hostile and reluctant witness. Judge Mishler found it necessary to warn courtroom spectators against any efforts at intimidating the witness. (T. 380-382).

which contained buildings which were two to three stories in height (T. 400). After they arrived, appellant left the car for a few moments and returned (T. 385). When appellant returned to his car, he first opened the trunk and then closed it before getting into the car (T. 385-386). Appellant then drove back along a highway toward Brooklyn. As appellant drove off, McKenney observed King and Graham driving along the same highway in a different car (T. 386). Eventually, appellant drove McKenney to an apartment building on Vermont Street in Brooklyn, where she knew King resided. Appellant left McKenney in the car and entered the apartment building, remaining there some forty-five minutes (T. 387-388). When appellant returned to his car he took McKenney to lunch. At that time he gave McKenney one hundred dollars.

Special Agent Ronald Mahaffey of the F.B.I. testified that he interviewed Graham after his arrest on April 13, 1977. Graham admitted his participation in the February 9th robbery of the European American Bank and signed a written statement to that effect (Exhibit 3A). His detailed statement was consistent with the version of the facts testified to by King at trial. Mahaffey testified further that on April 19, 1977 he interviewed appellant and that appellant also confessed his involvement in the bank robbery. In addition, appellant advised Mahaffey that he had been informed by Williams at Rikers Island that King had "talked" regarding their bank robbery. Williams stated that King's family "would be taken care of." Appellant advised that on another occasion Williams showed him a newspaper article which reported that Williams and several unnamed persons had been indicted for bank robbery. And, finally, on the morning of April 19, 1977, just before appellant was transported from Rikers Island to the Federal District Courthouse, Williams advised appellant to "be cool" and warned him that he could meet the same fate that he (Williams) intended for King's family.

B. The Defense Case

Appellant testified in his own behalf at trial, as did his co-defendant Gary Graham. No other witnesses were called by the defense. Appellant's trial counsel sought to develop, by cross-examination of King, a motive for King to testify falsely and wrongly implicate appellant. The most fertile area for trial counsel in that regard was an incident in which King apparently accused appellant of having an affair with his (King's) wife.¹¹

Appellant testified that he had previously been convicted for bank robbery in 1970 and sentenced to fifteen years imprisonment, later reduced to ten years. Appellant admitted that he was in fact guilty of that crime (T. 407-408).

Regarding his written statement confessing his involvement in the February 9th bank robbery, he testified, in essence, that it was a complete fabrication. Appellant stated that on April 19, 1977 two marshals picked him up from Rikers Island where he was serving a term for grand larceny, and transported him to the Federal District Courthouse in the Eastern District of New York (T. 413-414). Appellant said that on the day before the marshal's visit, he had written a letter to Washington,

¹¹ King admitted that on an evening in 1976 when appellant, King and King's wife had been drinking together in King's apartment, King accused appellant and his wife of having an affair. King, who apparently flew into a rage, forced both appellant and his wife to disrobe, somehow stabbed his wife, and forced appellant to escape through a window. Later that same evening, however, appellant returned to the apartment and spoke to King. After asking whether he (King) was alright, Appellant left and that was the end of the matter (T. 119-125).

When appellant testified, he recalled that the stabbing incident took place in May or June of 1975 (T. 410). Appellant's account of what happened was essentially the same as King's (T. 410-412).

D.C. seeking a parole revocation hearing. He claimed that when the marshals came to pick him up the following morning he believed that that it was in connection with the letter he had mailed to Washington, D.C. just the day before. Appellant testified that after he arrived at the holding area of the Eastern District Courthouse Special Agent Mahaffey took him into custody and escorted him upstairs to an office. There, appellant claimed, Mahaffey informed him that his brother-in-law, Graham, and Curtis King had already implicated him in a bank robbery. Appellant stated that Mahaffey read to appellant from statements he already had in his possession and asked appellant to repeat back the statements in his own words. Appellant claimed that Mahaffey recorded his words as he parroted the statements. When Mahaffey was finished, he allegedly advised appellant to sign the resulting written statement. Mahaffey supposedly told appellant that if he signed the statement, nothing would happen to him. Appellant testified that when he protested his innocence Mahaffey intimated that his guilt or innocence was not the issue; only his cooperation was. Appellant then signed the statement in order to "free himself" (T. 415-420).

Appellant denied knowing Robert McGray. He also denied that Charles Williams had told him King was "talking" or that Williams had threatened him in any way (T. 453.). When asked on cross-examination whether or not during a prior hearing in which appellant testified essentially the same way regarding the Williams threats, Williams had been present in the Courtroom, appellant repeatedly stated that he could not recall or that he did not quite understand the questions. After the court took a short recess, however, during which time the Court requested that defendant confer with counsel, appellant admitted that Williams was present at the prior meeting (T. 459-464).

Appellant who, of course, was present during Norvette McKenney's testimony, stated that he had been in her company on many occasions, and that she had been in his Red Lincoln many times (T. 436). He admitted on cross-examination, however, that at a prior hearing when asked where the name "Norvette McKenney" came from in his written, supposedly fabricated statement, he denied knowing McKenney, and suggested that perhaps she was a girlfriend of Curtis King (T. 437).

Appellant's co-defendant, Gary Graham, testified that he too was duped into signing a false statement implicating himself, his brother-in-law and others in a bank robbery. The college educated Graham claimed he did not read the statement and was not aware that it contained any references to his brother-in-law. He admitted, however, that he had placed his initials on various lines of the statement only a few words from the name "Ronald Bell" (T. 503-506).

C. The Suppression Hearing

Before the commencement of trial, appellant moved to suppress his written and oral post indictment statements on the ground that they were obtained during an impermissible delay before his arraignment. Appellant later asserted the additional ground that any waiver of his Sixth Amendment rights had been ineffective. Judge Henry Bramwell conducted a hearing on appellant's motion on June 21, 1977.¹² The hearing disclosed the following facts:

¹² Appellant's co-defendants Gary Graham and Robert Hairston made similar motion regarding their post indictment statements. Judge Bramwell conducted hearings on all three suppression motions between June 20th and June 22, 1977. All motions were denied.

Pursuant to a writ of *habeas corpus ad prosequendum* obtained after bench warrants had issued on an indictment, appellant was brought by United States Marshals from the Rikers Island House of Detention for Men to the United States District Court for the Eastern District of New York, arriving at approximately 11:10 A.M. on April 19, 1977 (H. 120-121, 146).

Agent Mahaffey met appellant in the basement holding area for prisoners in the courthouse and brought him up to the office of Assistant United States Attorney Zachary Carter (H. 113-126).¹³ There, Agent Mahaffey introduced appellant to Mr. Carter who then left the office (H. 126-127). After the Assistant United States Attorney had left his office, Agent Mahaffey advised appellant that an indictment had been handed up against him charging him with bank robbery. He explained to appellant that he had been produced to appear before a judge to answer to that indictment (H. 113-114). At about this point, appellant indicated that he recognized Mahaffey as the agent who had arrested him in connection with his previous bank robbery conviction (H. 113). Agent Mahaffey proceeded to review the indictment with appellant, pointing out the particular counts in which he was named (H. 114, 129). Mahaffey told appellant that he wished to discuss the indictment with him but, advised appellant that he need not make any statement at all, and certainly not in the absence of counsel (H. 114). Mahaffey further advised appellant that he would be assigned counsel that very morning since he was to be arraigned shortly (H. 114, 134-135). Mahaffey also explained that if appellant decided to make any statements, he could stop talking at any time (H. 114). At this point, Mahaffey showed appellant

¹³ Earlier, when Agent Mahaffery had arrived at the office of the United States Attorney, Mahaffey learned that an administrative problem at Rikers Island had resulted in a delay, and that appellant would be arriving later than the 10:00 A.M. time originally scheduled for arraignment.

a form entitled "Interrogation; Advice of Rights" and asked whether or not appellant recognized it. Appellant stated that he did (H. 114-115).¹⁴ Mahaffey then asked appellant to read the form. After he had read it, appellant stated that he understood it. Mahaffey asked appellant to sign the form if he understood and waived the rights contained on its face. Appellant did so at 11:23 AM (A. 135)

From then and until a minute or two before he was arraigned at 12:30 pm, appellant gave Agent Mahaffey a statement admitting his involvement in the February 9, 1977 robbery. Appellant's admissions concerning that robbery and his receipt of proceeds from another robbery were recorded by Agent Mahaffey. After having reviewed

¹⁴ The form reads as follows:

INTERROGATION: ADVICE OF RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed

Witness:

Witness:

Time:

this written statement line by line, appellant signed the statement (H. 115-118). During appellant's interview, appellant told Mahaffey that he had seen Charles Williams that same morning when the deputy marshal had come to transport him to the Eastern District Courthouse, and that at that time he (Williams) had reiterated an earlier warning to appellant to "be cool" and had reminded appellant what he (Williams) had in store for Curtis King's family (H. 116-118). Agent Mahaffey testified that as a result of appellant's expressions of fear against reprisals, arrangements were made for his safety (H. 116, 117). Mahaffey also testified that, during the course of the interview, he advised appellant that the Government would make the court aware of his cooperation, and that no other promises were made (H. 142-142a). When Mahaffey had nearly completed taking appellant's statement, he was notified that Judge Bramwell, who theretofore had been engaged in another matter, was now ready to arraign appellant. Appellant was arraigned moments later (H. 137).

Appellant testified that on April 19, 1977, when he was picked up by the marshals, he believed that it was in connection with a letter he had written to Washington, D.C., just the day before, requesting a parole revocation hearing (H. 145). He admitted that after seeing Mahaffey, he recognized him as the agent who had arrested him for bank robbery before (H. 146). Appellant, who testified in a courtroom where Charles Williams, Robert McGray and Gary Graham were also present, denied that he had given Mahaffey any information implicating himself or any of the others in a bank robbery. He also denied that he had been threatened by Williams. Appellant claimed, as he did later at the trial, that the statement he ultimately signed was fed to him by Mahaffey from a statement the agent already had.

On cross examination, appellant stated that he "didn't recall" whether Agent Mahaffey had advised him of his

rights (H. 169). Similarly, appellant did not recall whether or not he was shown a copy of the indictment (H. 169). Appellant claimed that Mahaffey had intimated that he was aware that appellant was not involved, but that, nonetheless, the one way appellant could help himself was to cooperate (H. 196). Appellant indicated in his testimony that he did not appreciate the significance of waiving his right to counsel, but he admitted that on at least five previous occasions, in other matters, he had been represented by an attorney.

Appellant's motion to suppress was denied. Judge Bramwell filed an opinion which stated his findings of fact and conclusions of law.¹⁵ In reaching his decision, Judge Bramwell stated that he "fully credited the testimony of Agent Mahaffey, finding it totally credible," and that he found that appellant's "version of the underlying facts lacks credibility" (O. 1). Judge Bramwell found specifically that Agent Mahaffey had informed appellant that he was under indictment and of the nature of the charges against him; that Agent Mahaffey had advised appellant of his Constitutional Rights, including his right to counsel; and that appellant had knowingly waived these rights (O. 2-8). Judge Bramwell further found that appellant had had prior exposure to the criminal justice system having been arrested at least once before, and that he had previously been exposed to the F.B.I. Constitutional rights and waiver forms. Judge Bramwell found that appellant was neither distraught, upset, weeping, or out of control, but rather that he was in full possession of his physical and mental capacities at the time he gave the statement, and that he voluntarily executed the statement in order to secure for himself the benefits of cooperation (O. 8, 12).

¹⁵ Judge Bramwell's "Findings of Facts and Conclusions of Law," which include a detailed statement of the court's findings, is included in the appendix to appellant's brief. References to his opinion will be preceded by the letter "O."

Judge Bramwell held that there was no unnecessary delay in presenting appellant's arraignment which would have affected the voluntariness of his statement (O. 9-11). Judge Bramwell further held that "the signing of the F.B.I. waiver and the giving of his statement were the product of a rational and uncoerced mind, fully cognizant of the nature of the charges against him, the scope of his Constitutional rights and the consequences of a waiver and making of an inculpatory statement." (O. 12).

POINT I

Appellant's post-indictment, pre-arraignment statements were properly admitted against him at trial.

Appellant claims that his post-indictment, pre-arraignment statements were "unlawfully" obtained.¹⁶ Specifically, he contends that the delay in presenting him for arraignment on the indictment, while perhaps not "unnecessary" within the meaning of the *McNabb-Mallory* rule or section 3501 of the United States Code, was nevertheless "inexcusable and improper." Appellant further contends that having been indicted, any waiver

¹⁶ The characterization of appellant's statements as "pre-arraignment" arises purely from a procedural accident that makes it difficult to characterize them as "post-arrest". When the indictment in this case was handed up, bench warrants were issued for the arrest of each of the defendants named in the indictment, several defendants, including appellant's co-defendant, Gary Graham, were indeed arrested. Others, including appellant, who were already incarcerated in various institutions, were produced by writ of habeas corpus. Therefore, there is no meaningful distinction in circumstances between those defendants arrested on the street, and those who were already incarcerated and produced pursuant to a writ. We believe that appellant attaches undo significance to the use of the writ in this case, in the context of the issues before the Court. We urge this Court that wherever the term "pre-arraignment" appears, that the Court think "post-arrest".

of his right to counsel, without advice of counsel, was ineffective. Alternatively, appellant argues that the Government failed to meet its "heavy burden" of proving that he had effectively waived his Sixth Amendment right to counsel.

While appellant all but concedes that the delay in presenting him for arraignment was not "unnecessary" in a conventional sense (i.e. within the meaning of the controlling case and statutory law) we will address the issue of unnecessary delay since appellant's concession in this regard puts his other arguments in perspective.

As Judge Bramwell pointed out in his opinion, the court in *United States v. Collins*, 462 F.2d 792 (2d Cir. 1972), found that Section 3501 of Title 18 of the United States Code appears, "to have modified the *McNabb-Mallory* rule that unnecessary delay in arraignment is sufficient in and of itself to require exclusion of a confession. Rather, the Congressional test would seem to be voluntariness of a confession under all the circumstances."¹⁷ Any delay between arrest and confession or

¹⁷ Title 18, United States Code Section 3501(c) provides in pertinent part as follows:

In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention . . .

arrest and arraignment is but an additional factor to be weighed by the judge in determining voluntariness and is not determinative by itself. *United States v. Marrero*, 450 F.2d 373 (2d Cir. 1971). And while Chief Judge Friendly stated in his concurring opinion in *Marrero*, *supra*, that a detour through the United States Attorney's office, *under the circumstances presented in the case* would have been "unnecessary delay" requiring suppression of any resulting statement prior to the enactment of Section 3501(c), the Chief Judge agreed that after the enactment of Section 3501 such a delay in arraignment would be but one factor to be considered in determining whether or not the statement was voluntary. Moreover, it has been held that a voluntary confession made within six hours of arrest or detention is admissible without reference to delay. *United States v. Halbert*, 436 F.2d 1226 (9th Cir. 1970).

In the case at bar, appellant began his statement less than fifteen minutes after he arrived in the United States Attorney's Office, clearly within the six hour limit of 3501(c). Undoubtedly, even without reference to Section 3501(c), the time it took to reduce appellant's oral statement to writing is considered reasonable. *United States v. Curry*, 358 F.2d 904 (2d Cir. 1965), *cert. denied*, 385 U. S. 873 (1966).¹⁸

¹⁸ Appellant relies rather heavily upon comments made by Judge Mishler during the trial. These comments must be put in their proper perspective. It is illuminating to consider the chronology of those comments in context. First, Judge Mishler expressed grave concern over the admissibility of appellant's statement after he learned midway through Agent Mahaffey's testimony that the statement had been obtained just prior to appellant's arraignment. Judge Mishler stated at that time that he thought he recalled a recent decision that prohibited the use of such statements obtained in the office of the United States Attorney prior to arraignment (T. 328).

[Footnote continued on following page]

Turning next to the appellant's claim that his waiver of the right to counsel was ineffective, we recognize that the use at trial of a statement obtained from an indicted defendant would be unconstitutional in the absence of an effective waiver of his Sixth Amendment right to counsel, *Massiah v. United States*, 377 U.S. 201, 206 (1964). This Circuit, however, has never recognized a *per se* prohibition against the use of such post-indictment statements. In *United States v. Satterfield*, 558 F.2d 655 (1976), this Court specifically rejected the lower court's view that *Massiah* prohibited the taking of any uncounseled statement from an indicted defendant. Rather, the Court held that the Government bore the heavy, but not insurmountable, burden of establishing a voluntary, knowing and intelligent waiver of a defendant's Sixth Amendment right to counsel. That principle was recently reaffirmed in *United States v. Lord*, — F.2d — (2d Cir. Slip Op. 347, decided November 15, 1977), which we submit is directly in point. There, this Court stated that the use of a confession obtained from an indicted defendant against him at trial was unconstitutional unless he waived his Sixth Amend-

At this time, Judge Mishler had not had the opportunity to review either the transcript of the suppression hearing or Judge Bramwell's written opinion. Later, when he had assembled all counsel in his chambers, Judge Mishler advised that he had located the case he had in mind, *United States v. Duvall*, 537 F.2d 15 (2d Cir.), *cert. denied*, — U.S. —, 96 S. Ct. 3173 (1976). That case did not announce a *per se* exclusionary rule as Judge Mishler had earlier believed. At this point Judge Mishler declined to grant mistrial motions he had earlier invited (T. 338-343). On a subsequent date during the trial, Judge Mishler announced that he was reviewing the memorandum of law submitted in connection with the suppression as well as Judge Bramwell's written decision. Judge Mishler stated: "I assume I have everything but I haven't looked at any of the papers. I'll tell you that this was just a reaction of mine. I may be way off base after a close look." (T. 451). Finally, on September 10, 1977 when appellant was sentenced, he denied appellant's motion for a mistrial.

ment right to counsel before he confessed. The Court went on to state:

"When Government agents or prosecutors choose to interrogate an indicted, unrepresented defendant, they assume the heavy burden of proving that any inculpatory statements thus obtained were voluntary given after a valid waiver of the right to counsel. *United States v. Satterfield, supra*; *United States v. Massimo*, 432 F.2d 324, 327 (2d Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971) (Friendly, C. J. dissenting).

In holding that the defendant's statement had been properly admitted against him at trial, the *Lord* Court stated:

"The salient factor in our decision is that Schwartz confessed after approximately *one-half hour* of questioning. . . . Moreover, nothing in the record leads us to believe that Schwartz did not waive his rights voluntarily and with a full appreciation for the significance of his admissions. He was orally advised of his Fifth and Sixth Amendment rights upon his arrest. He read and signed the Standard "advice of rights" form and a waiver form. Unlike the defendant in *United States v. Satterfield, supra*, Schwartz was not an individual "distracted, upset, weeping and obviously out of control" while in custody. *Having been arrested three times prior to the occasion at issue, he was familiar with his rights.*" (emphasis added)

That *Lord* is applicable to the facts in the case at bar is beyond question. Appellant confessed after fifteen minutes of questioning. He was repeatedly advised of his rights, and Agent Mahaffey emphasized that the appointment of counsel for him was imminent. Judge Bramwell found that appellant fully understood his

rights. And finally, appellant was found to have been familiar with the advice of rights form and specifically his right to counsel, having been arrested and represented by counsel on at least five previous occasions. In light of the *Lord* decision, there can be no doubt that appellant's waiver of his right to counsel was effective and that, therefore his statements were properly admitted at trial.¹⁹

POINT II

The trial judge did not commit error in charging the jury that it could consider evidence of appellant's bank robbery as proof of his identity in the instant case.

Appellant contends that the trial judge erred when he charged the jury that evidence of appellant's prior bank robbery might be considered as proof establishing appellant's identity as one of the robbers in the robbery charged

¹⁹ Appellant offers no compelling reasons why this Court should adopt the New York rule which excludes all uncounseled post-indictment statements. This Court's holding in *Satterfield* and *Lord* implicitly recognize the right of an accused to carefully weigh his options, and under circumstances where or knowing and intelligent waiver can be established, secure whatever benefits he can from cooperating with the authorities. The notion that the process of indictment is an irreversible one is more mythical than real. While the district court has the power to grant or deny motions for dismissal of indictments and to accept pleas to lesser counts, practical experience demonstrates the enormous discretion prosecutors are allowed to exercise in this regard. The benefits a defendant such as appellant can, and in this case, did seek, are real and not imaginary. Contrary to appellant's assertions, the record indicates that the purpose of appellant's interview was not only to secure a self-incriminating statement, but also to offer appellant the opportunity to secure the benefits of co-operation.

in the indictment. The thrust of appellant's argument seems to be that in absence of affirmative steps taken on the part of the government to introduce evidence of the prior bank robbery on its direct case or of a specific request made to the Court for a similar act charge, the Court should not have charged the jury on the similar act.

It is well established in this circuit that the rule regarding evidence of similar acts is an inclusionary one which renders such evidence admissible "for all purposes except to show the criminal character or disposition of the defendant." *United States v. Warren*, 453 F.2d 738, 745 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Gerry*, 515 F.2d 130, 141 (2d Cir. 1975); *United States v. Papudakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 1975; *United States v. Bretholz*, 485 F.2d 483, 487-488 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974); *United States v. Deaton*, 381 F.2d 414, 117-118 (2d Cir. 1967).

In ruling on the admissibility of evidence of similar acts, the trial judge is required "to balance the probative value of the proffered evidence, on the one hand, against its prejudicial character, on the other." *United States v. Byrd*, 352 F.2d 570, 574 (2d Cir. 1965). Several factors are involved in this balancing: (1) the strength of the defendant's connection with the similar act, *United States v. Bretholz*, *supra*; (2) whether the Government has an actual need for the proffered evidence in light of the issues and other evidence available to it, *United States v. Bretholz*, *supra*; (3) closeness in time between the similar act and the act charged in the indictment; and similarity in *modus operandi* between the act charged and the similar act *United States v. Smith*, 343 F.2d 607, 608-609 (2d Cir. 1965).

Evidence of a prior similar act is admissible to prove the identity of the perpetrator of the act charged in the indictment. *United States v. Ravich*, 422 F.2d 1196, 1205

(2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *Bradley v. United States*, 433 F.2d 1113, 1119 (D.C. Cir. 1969). The prior crime need not be completely similar nor completely related to the crime charged, and if it is otherwise competent, proof of a similar act is admissible even if it was the subject of a previous acquittal *United States v. Feinberg*, 383 F.2d 60, 71 (2d Cir. 1967) *cert. denied*, 389 U.S. 1044 (1968).

The trial record indicates that it was appellant's counsel who first mentioned the use of the prior bank robbery conviction as a similar act in the context of a discussion on whether that conviction would be used for impeachment purposes and as a similar act establishing identity. The Assistant United States Attorney stated that he had not planned to use that conviction as a similar act, but he did not foreclose that possibility. Indeed the record shows that neither counsel for the Government nor counsel for appellant was aware at that time of the underlying facts which were the basis of that conviction. (H 1-14). After it came to light that appellant had in fact committed an armed bank robbery, appellant testified regarding the robbery on his direct examination. Since appellant had already promised to take the stand in his opening, the introduction of that conviction became inevitable, and it was therefor unnecessary for the government to introduce the conviction on its direct case.

Indeed, when it came to light that appellant had indeed committed an armed bank robbery for which he had been convicted, counsel for appellant argued for the exclusion of that conviction for impeachment purposes stating that the prior act was *identical* and thereby prejudicial. Judge Mishler ruled that the prior bank robbery could be used for both impeachment and similar act purposes. (H. 279-283).

Applying the balancing test for determining whether or not a similar act should be admitted, it is clear that

the trial judge charged correctly. First of all, there is no doubt that appellant committed the similar act and he so testified at trial. Secondly, the need for the evidence was great in light of the issues and other available evidence. This case involved *masked* bank robbers whom no non-accomplice witnesses could identify. Furthermore, appellant had interjected in the case an arguably strong motivation for the Government's witness to falsely identify him as one of the bank robbers. Thirdly, the prior bank robbery was an *armed* robbery. The weapons aspect made the robberies similar in at least that regard. On balance, we submit, the case was an appropriate one for the admission of similar act evidence which tended to prove that appellant was in fact one of the masked robbers. We submit that the Court did not err in this regard.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

ZACHARY CARTER

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19th day of December 19 77 he served a copy of the within
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

HAROLD L. LEVY, ESQ., 32 COURT STREET, SUITE 802

BROOKLYN, NEW YORK 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Sworn to before me this

19th day of December 19 77

Zachary Carter

